

**BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001**

ANNUAL COMPLIANCE REPORT, 2012

)
)

Docket No. ACR2012

**COMMENTS OF
ALLIANCE OF NONPROFIT MAILERS**

David M. Levy
Matthew D. Field
VENABLE LLP
575 Seventh Street, N.W.
Washington DC 20004
(202) 344-4732

Counsel for Alliance of Nonprofit Mailers

February 1, 2013
(refiled February 4, 2013)

**BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001**

ANNUAL COMPLIANCE REPORT, 2012

)
)

Docket No. ACR2012

**COMMENTS OF
ALLIANCE OF NONPROFIT MAILERS**

Pursuant to Order No. 1609, the Alliance of Nonprofit Mailers ("ANM") respectfully submits these comments on the Postal Service's Annual Compliance Report for Fiscal Year 2012. These comments concern the lawfulness of the worksharing discounts maintained by the Postal Service in FY 2012 for nonprofit Standard Mail.

SUMMARY

Recent developments at the Commission concerning nonprofit worksharing discounts leave ANM feeling a bit like Bill Murray in the 1993 movie *Groundhog Day*. Thirty-two years after the U.S. Court of Appeals ruled that the Postal Service could not discriminate without good reason against nonprofit mailers in setting worksharing discounts for Standard Mail (then called third-class mail); 16 years after another D.C. Circuit proceeding filed by ANM led to the adoption in Docket No. MC96-2 of nonprofit worksharing discounts that "mirror" commercial discounts; four years after the Commission held in Docket No. R2009-2 that the Postal Service could not establish discriminatory prices for Confirm pricing without an adequate justification; and two years after the Commission held in Docket No. R2011-5 that the Postal Service could not,

without an adequate justification, exclude nonprofit mailers from promotional discounts offered to commercial mailers for placing consumer-readable barcodes on mailpieces, ANM again finds itself compelled to defend these principles in litigation.

In Section I.A, we show that 39 U.S.C. § 403(c) and *National Easter Seal Society v. USPS*, 656 F.2d 754, 760-72 (D.C. Cir. 1981), still prohibit the Postal Service from setting worksharing discounts that discriminate between nonprofit and commercial mail without a reasoned justification. In Sections I.B and I.C, respectively, we demonstrate that the disparities between the worksharing discounts established for nonprofit and commercial mailers have no reasoned justification, and therefore violate Section 403(c). In Section II, we discuss an appropriate remedy.

It is possible that the Commission's ultimate decision to allow implementation of the nonprofit discounts at issue in Docket No. R2013-1 reflected nothing more than a judgment that the discrimination issue was not big or extraordinary enough to warrant delaying the infusion of new revenue that the Postal Service sought in that case, and that the Commission was putting off the issue for resolution in a later case such as this docket. If that is what the Commission meant, ANM respectfully requests that the Commission so clarify. ANM also requests that the Commission (1) confirm that the relationship between commercial and nonprofit worksharing discounts in Standard Mail continues to be governed by the standards established in 39 U.S.C. § 403(c) and *National Easter Seal Society*; (2) find under 39 U.S.C. § 3653(c)(1) that the worksharing discounts offered to nonprofit Standard Mail during Fiscal Year 2012 did not satisfy those standards; and (3) make the same finding about the worksharing discounts established for nonprofit Standard Mail in Docket No. R2013-1.

BACKGROUND

These comments concern what ANM believed until seven weeks ago was a well-settled rule of law: that 39 U.S.C. § 403(c) forbids unreasonable discrimination between nonprofit and commercial mailers in the worksharing discounts offered to users of Standard Mail. On December 11, 2012, however, the Commission authorized the Postal Service to implement new rates for Standard Mail that, for a number of presort categories, included deeper worksharing discounts for commercial mail than for nonprofit mail. Docket No. R2013-1, *Notice of Market-Dominant Price Adjustment*, Order No. 1573 (December 11, 2012) at 6-9. The Commission took this action without, in ANM's view, any plausible (or even coherent) justification for the discrimination. ANM has petitioned for review of Order No. 1573 in the Court of Appeals. *Alliance of Nonprofit Mailers v. PRC*, No. 13-1006 (D.C. Cir., petition for review filed January 10, 2013).

During the proceedings in Docket No. R2013-1, the Postal Service admitted that "some Nonprofit discounts have varied from the corresponding Commercial presort discounts" in other price changes implemented in recent years. Docket No. R2013-1, USPS Response to Order No. 1541 (Nov. 26, 2012) at 7-8. Review of the worksharing discount schedules implemented by the Postal Service since 2006 in price change cases under 39 U.S.C. § 3622(d) has confirmed that this is so. While the worksharing discounts for nonprofit mail mirrored the commercial worksharing discounts in the price changes initially implemented by the Postal Service in the post-PAEA, the rate schedules adopted in recent years have increasingly departed from this standard. This is true of the Standard Mail rates in effect in Fiscal Year 2012. Accordingly, ANM raises the issue in this docket as well.

A brief review of the controlling precedent helps put the issue in this case in perspective.

A. Docket No. MC78-2 and *National Easter Seal Society* (1978-1981)

The issue of discrimination in worksharing discounts first arose in 1978, when the USPS proposed in Docket No. MC78-2 to begin offering presort discounts for third-class mail, the precursor of Standard Mail. The discounts were initially proposed only for regular (commercial) third-class mail. After several nonprofit mailers objected, the PRC ruled that the discounts should be extended to nonprofit mail as well. The PRC recommended, however, that the Postal Service immediately implement only the commercial discounts; the nonprofit discounts would be phased in over a period of years.

The nonprofit mailers sought review in the U.S. Court of Appeals for the D.C. Circuit. They argued that phasing in the nonprofit discounts, while immediately implementing the regular-rate discounts, violated 39 U.S.C. § 403(c), the ban on undue discrimination that was and still is part of the statute. Section 403(c) provides that the Postal Service, in “providing services and in establishing classifications, rates, and fees . . . shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.” The Court of Appeals agreed. In *National Easter Seal Society v. USPS*, 656 F.2d 754, 760-762 (D.C. Cir. 1981), the court ruled that disparities between the presort discounts offered to commercial vs. nonprofit users of third-class mail violated Section 403(c) “absent some reasonable ground for differential treatment.”

B. Docket Nos. MC95-1 and MC96-2

The *National Easter Seal Society* litigation led shortly afterwards to the founding of ANM by the nonprofit mailers that had pursued the litigation. Although worksharing discounts continued to generate controversy, the added element of undue discrimination between regular and nonprofit mail did not resurface as a major issue until Docket No. MC95-1, *Mail Classification Schedule, 1995—Classification Reform I*. In that case, the Postal Service proposed, and the Commission recommended, worksharing discounts and other classification reforms for Periodicals and Standard Mail that were limited to the commercial subclasses. ANM's petition for judicial review of this decision in the D.C. Circuit was resolved by a settlement agreement with the USPS under which it proposed, and the PRC approved, worksharing discounts that “mirrored” the Commission's recommendations for the Commercial subclasses. Docket No. MC96-2, *Mail Classification Schedule—Classification Reform II (Nonprofit Mail)*, Op. & Rec. Decis. (June 19, 1996). At that point, the relationship between regular and nonprofit discounts seemed to have been resolved for good.

C. Docket No. R2009-2

The next significant discrimination case involved a special service, not a class of mail. In Docket No. 2009-2, *Notice of Price Adjustment*, the Postal Service proposed, as part of a broad set of CPI-based price adjustments under 39 U.S.C. § 3622(d), to raise the annual subscription price for highest subscription tiers of Confirm service to higher levels for mailing agents than for mail owners, including an annual price of \$250,000 for the Platinum tier, ten times the amount proposed for mail owners. A group of mail services providers challenged the \$250,000 price as both unreasonably high and

unduly discriminatory in violation of Section 403(c). The Postal Service defended the price discrimination on the ground that mailing agent subscribers to the Confirm service cause most of its costs. The Commission, after scrutinizing the data offered by the Postal Service, rejected the defense as inadequate and the proposed Confirm subscription prices as unlawful. Order No. 191 (March 16, 2009) at 69-73.

D. Docket No. R2011-5

The discrimination issue reappeared in a related context in 2011, when the Postal Service proposed in Docket No. R2011-5, *Notice of Market Dominant Adjustment for First-Class Mail and Standard Mail*, to offer a temporary postage discount of three percent on mail carrying or containing a mobile (“3D”) barcode and entered in certain categories of First-Class Mail and Standard Mail during a two-month period in 2011. As proposed by the Postal Service, the discounts would have been offered only to commercial Standard Mail, not nonprofit Standard Mail. In response to a Chairman’s Information Request, the Postal Service asserted that the discrimination was justified by “the likelihood of a [greater] multiplier effect [from 3D barcodes on commercial mail], ease of administration, and the fact that nonprofit rates were already discounted.” Order No. 731 (May 17, 2011) at 8.

The Commission rejected these justifications as insufficient to satisfy 39 U.S.C. § 403(c) and *National Easter Seal Society*:

The Commission finds, consistent with the *Easter Seal* case, that the Postal Service has not articulated a rationale to justify the differential treatment of nonprofit mailers in this promotion. 656 F.2d at 761. The Commission directs the Postal Service to make the discount available to nonprofit mailers that comport with all the other program requirements. The Commission understands that the impact of the inclusion of nonprofit

mailers may be negligible, given the short lead time before the promotion, but reiterates the principle that the Postal Service must provide sufficient justification, pursuant to 39 U.S.C. 403(c), to exclude nonprofit mailers from a discount or rate on a product that has a nonprofit rate. *Id.* at 760-61.

Order No. 731 at 8-9.

E. Docket No. R2013-1

The discrimination issue resurfaced again in Docket No. R2013-1, *Notice of Market-Dominant Price Adjustment*. An employee of the PRC apparently noticed that several of the revised worksharing discounts proposed by the USPS for nonprofit Standard Mail were smaller than the corresponding discounts for commercial mail. The Commission issued a Chairman's Information Request seeking an explanation for these discrepancies:

Workshare Rate Category	Benchmark Rate Category	Discount		Percent Difference
		Commercial	Nonprofit	
Auto 5D Flats	Auto 3D Flats	\$0.087	\$0.080	-8.0%
Nonauto 3D Flats	Nonauto ADC Flats	\$0.052	\$0.045	-13.5%
High Density Letters	Carrier Route Letters	\$0.077	\$0.074	-3.9%
High Density Plus Letters	Carrier Route Letters	\$0.080	\$0.077	-3.8%
High Density Flats	Carrier Route Flats	\$0.051	\$0.049	-3.9%
High Density Plus Flats	Carrier Route Flats	\$0.055	\$0.053	-3.6%

The USPS admitted in response that “the Nonprofit discounts are generally lower than the Commercial discounts,” but asserted—without any explanation—that making nonprofit discounts shallower than the corresponding discounts for the commercial subclasses “protects against over 100 percent passthroughs for both Commercial and

Nonprofit.” USPS Response to Chairman’s Information Request No. 5, Question 8(b) (filed November 5, 2012).

This explanation evidently did not satisfy the Commission. Its November 16, 2012, order remanding the proposed Standard Mail rates to the Postal Service for reconsideration, asked the Postal Service to either (1) “provide a justification as to why it views the different levels of discounts to Standard Mail” as “consistent with the PAEA and not contrary to *National Easter Seal Society*” or (2) “revise these discounts.” Order No. 1541 at 51.

The Postal Service responded by proposing a new schedule of worksharing discounts that left the discrimination against nonprofits largely unchanged:

Workshare Rate Category	Benchmark Rate Category	Discount		Percent Difference
		Commercial	Nonprofit	
Auto 5D Flats	Auto 3D Flats	\$0.093	\$0.090	-3.2%
Nonauto 3D Flats	Nonauto ADC Flats	\$0.050	\$0.044	-13.5%
High Density Letters	Carrier Route Letters	\$0.077	\$0.074	-3.9%
High Density Plus Letters	Carrier Route Letters	\$0.080	\$0.077	-3.8%
High Density Flats	Carrier Route Flats	\$0.051	\$0.049	-3.9%
High Density Plus Flats	Carrier Route Flats	\$0.055	\$0.053	-3.6%

Abandoning its previous rationale for the discrimination, the Postal Service offered four new ones:

- (1) *National Easter Seal Society* holds that unequal worksharing discounts are not “discriminatory” if the Postal Service has a “reasonable ground” for the price disparities.

- (2) The requirement of 39 U.S.C. § 3626(a)(6) that the average revenue per piece from Nonprofit “products” equal, as nearly as practicable, 60 percent of the average revenue per piece from the corresponding Commercial “products,” is impractical to satisfy while simultaneously equalizing worksharing discounts between nonprofit and commercial Standard Mail.
- (3) “[I]dentical presort discounts could lead to users of” undiscounted Nonprofit rates “paying considerably more than 60 percent of the corresponding Commercial” rates, while users of discounted nonprofit rates “would pay considerably less than 60 percent” of discounted commercial rates. “One might argue” that this outcome “would be discriminating between regular Nonprofit mailers and presort Nonprofit mailers.” *Id.*
- (4) The Postal Service has established different worksharing discounts for nonprofit and commercial Standard Mail several times since the enactment of Postal Accountability and Enhancement Act of 2006 (“PAEA”), and the Commission has not objected.

USPS Response to Order No. 1541 (November 26, 2012) at 6-8.

ANM submitted comments rebutting each of the four new Postal Service rationales. Comments of ANM on USPS Compliance Filing (Dec. 4, 2012).

The Commission, in Order No. 1573, the December 11 final order in R2013-1, approved the rates set forth in the November 26 compliance filing without modification. The Commission acknowledged that “disparities between commercial and nonprofit

discounts are impermissible” under *National Easter Seal Society* “unless supported by a rational justification that the differential treatment is “specifically authorized” by another section of the statute.” Order No. 1573 at 8. The Commission also declined to adopt either the initial or subsequent policy justifications advanced by the Postal Service in support of the disparities. *Id.* at 8-9. Instead, the Commission offered several new rationales of its own:

National Easter Seal Society was decided before the PAEA and 39 U.S.C. 3626(a)(6) were enacted. Section 3626(a)(6) is silent on differing levels of discounts. However, section 3626(a)(6)(C) provides that “[r]ate differentials within each subclass of mail matter under former sections 4452(b) and (c) shall reflect the policies of this title, including the factors set forth in section 3622(b) of this title.” Section 3622(b)(4) specifically “allow[s] the Postal Service pricing flexibility.” Further, section 3622(b)(8) recognizes that changes in rates may be “of unequal magnitude within” classes of mail.

The Postal Service correctly points out that the *National Easter Seal Society* case does not forbid a differential between discounts, but it requires a reasonable justification for the disparity. Here, it justifies the differential with an assertion that equalizing the Nonprofit presort discounts with the Commercial presort discounts without setting the Nonprofit base rates higher would be neither more efficient nor preferable from a policy perspective. The Commission finds that the Postal Service may use its pricing flexibility in setting workshare discounts for commercial and nonprofit Standard Mail, and that in the circumstances of this rate adjustment, its justification is reasonable.

In future rate adjustment proceedings, the Postal Service must continue to identify in its workpapers when nonprofit workshare discounts differ from their commercial counterparts and to justify deviations from the discounts applied to commercial mail.

ANM petitioned for review of Order No. 1573 on January 10, 2013. *Alliance of Nonprofit Mailers v. PRC*, No. 13-1006 (D.C. Cir.).

F. Docket No. ACR2012

As the Postal Service acknowledged in Docket No. R2013-1, the divergence between nonprofit and commercial worksharing discounts that became an issue in that docket had already begun by Fiscal Year 2012. This table shows these anomalies for the Standard Mail rates in effect from the beginning of the fiscal year through January 21, 2012:¹

Workshare Rate Category	Benchmark Rate Category	Discount	
		Commercial	Nonprofit
Auto 5-Digit Flats	Auto 3-Digit Flats	\$0.079	\$0.076
Nonauto 3-Digit Flats	Nonauto ADC Flats	\$0.052	\$0.047
High Density Letters	Carrier Route Letters	\$0.070	\$0.068

This table shows the corresponding relationships for the Standard Mail rates in effect from January 22, 2012, through the end of the fiscal year:²

Workshare Rate Category	Benchmark Rate Category	Discount	
		Commercial	Nonprofit
Auto 5-Digit Flats	Auto 3-Digit Flats	\$0.085	\$0.076
Nonauto 3-Digit Flats	Nonauto ADC Flats	\$0.058	\$0.048
High Density Letters	Carrier Route Letters	\$0.072	\$0.069

The Postal Service, although aware of these disparities, has not attempted in this docket to reconcile them with 39 U.S.C. § 403(c) or *National Easter Seal Society*. See USPS Response to Chairman's Information Request No. 1, Question 3 (January 14, 2013) (identifying "nonprofit discounts that differ from commercial discounts").

¹ Source: <http://pe.usps.gov/Archive/HTML/DMMArchive20111107/Notice123.htm>.

² Source: <http://pe.usps.gov/Archive/HTML/DMMArchive20120122/Notice123.htm>.

ARGUMENT

I. THE DISPARITIES BETWEEN THE WORKSHARING DISCOUNTS ESTABLISHED FOR NONPROFIT AND COMMERCIAL STANDARD MAIL ARE UNLAWFUL.

A. 39 U.S.C. § 403(c) and *National Easter Seal Society* Still Forbid The Postal Service From Discriminating Without Good Reason Between Nonprofit and Commercial Standard Mail In Setting Worksharing Discounts.

The law governing rate discrimination by the Postal Service remains the same as in 1981, when the D.C. Circuit decided *National Easter Seal Society*; in 1996, when the Postal Service settled the litigation arising from Docket No. MC95-1 by supporting the establishment of nonprofit Standard Mail worksharing discounts in Docket No. MC96-2 that “mirrored” their commercial counterparts; in 1999, when the Commission rejected as unlawful the discriminatory increases in Confirm subscription prices proposed in Docket No. R2009-2; and in 2011, when the Commission held in Docket No. R2011-5 that the Postal Service could not, consistently with Section 403(c) and *National Easter Seal Society*, offer a commercial mailers a discount for using consumer-readable barcodes but withhold the same offer from nonprofit mailers. Section 403(c) has not been amended or repealed since 1981, and *National Easter Seal Society* has not been overturned by any subsequent court decision or legislation.

Neither the Postal Service nor the Commission managed to distinguish these authorities in Docket No. R2013-1. The Postal Service’s observation that *National Easter Seal Society* means that unequal worksharing discounts are not “discriminatory” if the Postal Service has a “reasonable ground” for the price disparities (USPS Response to Order No. 1541 at 6) misstates the holding of the court. Worksharing

discounts that differ between nonprofit and commercial Standard Mail are discriminatory by definition. The discrimination is not *undue*—and hence forbidden by 39 U.S.C. § 403(c)—if supported by a rational justification. Merely asserting that a reasonable ground for discrimination exists, however, is insufficient. The reasonableness of the asserted justification must be demonstrated, not merely asserted, assumed, or supported with a parade of makeweight, throwaway or otherwise irrational arguments. And the Commission must take a hard look at the justifications offered in defense of any discrimination, and not just accept them uncritically. *National Easter Seal Society*, 656 F.2d at 761-762; Docket No. R2009-2, *Notice of Price Adjustment*, Order No. 191 (March 16, 2009) at 69-72 (considering and rejecting several rationales offered by the Postal Service for discriminatory pricing of Confirm subscriptions); Order No. 731, *supra*, at 8 (considering and rejecting several rationales offered by the Postal Service in Docket No. R2011-5 for discriminatory offering of discounts for 3D barcodes). See also *GameFly, Inc. v. PRC*, No. 11-1179 (D.C. Cir., January 11, 2013), slip op. at 2 & 9 (Commission may not leave discrimination in place without a rational explanation; to sanction continued discrimination on “illogical” grounds is “arbitrary and capricious”).

Equally wide of the mark is the Commission’s suggestion in Docket No. R2013-1 that the 2006 enactment of PAEA has effectively overridden Section 403(c) and *National Easter Seal Society*, or at least narrowed their application and force (Order No. 1573 at 8-9):

National Easter Seal Society was decided before the PAEA and 39 U.S.C. 3626(a)(6) were enacted. Section 3626(a)(6) is silent on differing levels of discounts. However, section 3626(a)(6)(C) provides that “[r]ate differentials within each subclass of mail matter under former sections 4452(b) and (c) shall reflect the policies of this title, including the factors set forth in section 3622(b) of this title.” Section 3622(b)(4) specifically

“allow[s] the Postal Service pricing flexibility.” Further, section 3622(b)(8) recognizes that changes in rates may be “of unequal magnitude within” classes of mail.

None of these provisions even mentions discrimination, let alone purports to override, modify or restrict Section 403(c). *That* subject is specifically governed by Section 403(c), which has remained unchanged in Title 39 since before *National Easter Seal Society* was decided more than 30 years ago, and which was left untouched by PAEA in 2006.

Moreover, none of the cited provisions added by PAEA is in any respect inconsistent with Section 403(c). Sections 3622(b)(4) merely states the general “objective” that the Postal Service should have “pricing flexibility.” Section 403(c) leaves the Postal Service free to set its worksharing discounts (and any other rates) as high or as low as the other provisions of Title 39 allow, so long as the Postal Service exercises this pricing flexibility evenhandedly. Compliance with Section 403(c) does not eliminate pricing flexibility because nondiscriminatory prices may be set anywhere within the zone of maximum and minimum rate reasonableness defined by the other provisions of the statute. See *Texas & P. Ry. Co. v. United States*, 289 U.S. 627, 650 (1933); *American Express Co. v. State of South Dakota*, 244 U.S. 617, 624 (1917).

Section 3622(b)(8), another of the nine “objectives” of section 3622(b), also concerns the zone of maximum and minimum rate reasonableness, not discrimination. The second clause of the sentence (“however the objective *under this paragraph* shall not be construed to prohibit the Postal Service from making changes of unequal magnitude within, between, or among classes”) (emphasis added) serves to prevent the *first* clause of the sentence (“to establish and maintain a just and reasonable schedule

for rates and classifications”) from being misused to require uniform, across-the-board inflation adjustments. Once again, the prohibition against undue discrimination among similarly situated ratepayers is entirely consistent with a wide zone of maximum and minimum rate reasonableness.

In any event, if Sections 3622(b)(4) and 3622(b)(8) could somehow be construed to conflict with Section 403(c), the latter would trump the former. As the Commission recognized in Docket No. RM2009-3, *Consideration of Workshare Discount Rate Design*, the “objectives” and “factors” of 39 U.S.C. §§ 3622(b) and (c) are subordinate to the “‘out-of-bound’ lines” established by the CPI-based cap on class prices (§ 3622(d)), the limit on worksharing discounts (§ 3622(e)), and the revenue ceilings for the various categories of preferred mail (§ 3626), and must also be applied in a manner “consistent with the more general qualitative standards found in,” *inter alia*, 39 U.S.C. § 403(c). Order No. 536 (Sept. 14, 2010) at 16-17.

The same result is also warranted by the rule of statutory construction that gives specific statutory provisions priority over general provisions. Section 403(c) deals specifically with undue discrimination; the “objectives” of section 3622(b) are more general in scope. To read them as implicitly repealing or restricting Section 403(c) would violate the basic rule of construction that “the specific governs the general,” particularly where “Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2070-72 (2012) (citations omitted). Moreover, “[w]hile a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . ‘repeals by implication are not favored’ and will

not be presumed unless the ‘intention of the legislature to repeal [is] clear and manifest.’” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2532 (2007) (citations omitted).³ No such intention appears in the text or legislative history of PAEA.

Finally, the notion that the enactment of PAEA in 2006 has legislatively overridden or modified 39 U.S.C. § 403(c) or *National Easter Seal Society* is at odds with the Commission’s actions in Docket Nos. R2009-2 and R2011-5, *supra*. In neither of these discrimination cases, both of which were decided several years after PAEA became law, did the Commission suggest that the 2006 amendments might have in any way lessened the force or rigor of the antidiscrimination requirements. To the contrary, the greater pricing flexibility afforded by PAEA requires, if anything, even stricter scrutiny of the explanations offered by the Postal Service for discrimination. As the Commission noted in rejecting as inadequately supported the Postal Service’s justifications in Docket No. R2009-2 for price discrimination among Confirm subscribers, *the “trade-off for the Postal Service’s increased price adjustment flexibility [under PAEA] is increased transparency.”* Order No. 191 at 72.

³ The same analysis disposes of 39 U.S.C. § 3622(e), which the PRC has cited elsewhere in disputes over the proper level of worksharing discounts. Section 3622(e), a provision included in PAEA at the behest of postal labor, limits worksharing discounts to 100 percent of avoided costs except in certain specified circumstances. The PRC has argued in several recent decisions that the absence of a similar statutory *floor* on worksharing discounts implies that Congress meant to permit the USPS, as a matter of rate reasonableness, to set worksharing passthroughs well below 100 percent of avoided costs. Section 3622(e), however, merely concerns the *absolute* level of worksharing discount passthroughs; the provision says nothing about the *relationship* between the worksharing passthroughs offered to two different groups of mailers. That issue falls within the province of Section 403(c).

B. The Postal Service Has Failed To Establish Any Rational Basis For The Discrimination.

Neither the Postal Service nor the Commission has identified any purported justification for the discrimination between the worksharing discounts in nonprofit and commercial Standard Mail that could pass muster under 39 U.S.C. § 403(c). First, the Postal Service's filings in this docket do not even attempt to justify the discrimination. Second, the rationalizations offered by the Postal Service for the discrimination in Docket No. R2013-1 cannot fill this gap. The Commission accepted none of them, and with good reason.

(1) The first attempted justification offered by the Postal Service in R2013-1 was that making nonprofit discounts shallower than the corresponding discounts for the commercial subclasses "protects against over 100 percent passthroughs for both Commercial and Nonprofit." This explanation, however, makes no sense at all. The Postal Service uses the *same* cost avoidance data as benchmarks for *both* the commercial and nonprofit worksharing discounts. Those data are based on *both* commercial and nonprofit mail: the USPS stopped collecting separate cost avoidance data for commercial and nonprofit mail several years ago. Hence, the data provide no basis for treating nonprofit cost avoidances as smaller. As the Commission noted in an analogous context in Docket No. R2009-2, price discrimination cannot be justified under 39 U.S.C. § 403(c) by hypotheses about cost differences that are unsupported by data:

A further problem with the Postal Service's proposal to drastically increase the prices paid by mailing agents for Confirm service is its own admission in its recent Annual Compliance Report that it does not have cost, revenue, or volume data for Confirm service. FY 2008 ACR at 8-9. Without cost, revenue, or volume data, the Commission has no reliable basis for concluding that a price increase of this magnitude targeted solely

to mailing agents for Platinum tier Confirm service will “better” align costs with revenues.

Order No. 191, *supra*, at 71.⁴

(2) The Postal Service also argued in Docket No. R2013-1 that compliance with Section 403(c) is impractical (or overly complex) because rates cannot be designed with nonprofit worksharing discounts that equal the corresponding commercial discounts without violating the separate requirement of 39 U.S.C. § 3626(a)(6) that the average revenue per piece from Nonprofit “products” equal, as nearly as practicable, 60 percent of the average revenue per piece from the corresponding Commercial “products.” USPS Response to Order No. 1541 at 6-7.

This argument misreads the statute. Section 3626(a)(6) does not require that the Postal Service apply the 60 percent ratio to each *individual* rate cell or even “product”: the statutory ratio governs the relationship between average revenue per piece for nonprofit vs. commercial Standard Mail only at the *subclass* level of aggregation. *Id.* (emphasis added). (In fact, because there are no longer separate subclasses, the 60 percent ratio is now applied at the class level.) The Postal Service certainly did not apply the 60 percent ratio to individual rate cells or rate categories when designing the rates proposed in this case. Indeed, for no individual rate category is the ratio between the nonprofit rate and the corresponding commercial rate established in Docket No.

⁴ Nor is there any *intuitive* reason to suspect that that worksharing cost avoidances might be smaller for nonprofit mail. The mail category pairs between which worksharing avoidances are calculated—e.g., auto 5D flats vs. auto 3D flats, nonautomation 3D flats vs. nonautomation ADC flats, high density letters vs. carrier route letters, high density plus letters vs. carrier route letters, high density flats vs. carrier route flats, high density plus flats vs. carrier route flats—are narrow and quite homogeneous.

R2013-1 equal to 60 percent. Docket No. R2013-1, ANM Comments on USPS Compliance Filing (Dec. 4, 2012) at 5-8 (Tables 1 and 2).

Moreover, as ANM demonstrated in Docket No. R2013-1, the additional revenue leakage that would result from making the nonprofit Standard Mail worksharing discounts as deep as the corresponding commercial discounts would not require large offsetting increases in undiscounted nonprofit rates. Fully equalizing nonprofit Standard Mail worksharing discounts with their commercial counterparts would result in less than \$3.1 million in additional revenue leakage per year—equal to approximately 1/50 of one cent per piece of nonprofit Standard Mail, or 17/100 of one percent of total nonprofit Standard Mail revenue. Offsetting this modest amount of additional leakage could be accomplished by making any number of minor adjustments to other elements of the nonprofit Standard Mail rate schedules. *Id.* at 10-11 (Table 3). Simultaneous compliance with both Sections 403(c) and 3626(a)(6) is not a regulatory Rubik’s Cube.

Finally, the insubstantiality of the Postal Service’s argument to the contrary is underscored by its belated appearance. The 60 percent ratio provision has been part of 39 U.S.C. § 3626 for more than 12 years. Pub. L. No. 106-384, § 1(d), Oct. 27, 2000, 114 Stat. 1460 (codified at 39 U.S.C. § 3626(a)(6)). Until recently, however, the Postal Service somehow managed to comply with both Section 3626(a)(6) and with Section 403(c).

(3) The Postal Service’s objection that “identical presort discounts could lead to users of” undiscounted Nonprofit rates “paying considerably more than 60 percent of the corresponding Commercial” rates, while users of discounted nonprofit rates “would pay considerably less than 60 percent” of discounted commercial rates (USPS

Response to Order No. 1541 at 7), is equally wide of the mark. So is the notion that “[o]ne might argue” that this outcome “would be discriminating between regular Nonprofit mailers and presort Nonprofit mailers.” *Id.*

Identical presort discounts certainly tend to cause users of undiscounted Nonprofit rates to pay a higher ratio of the corresponding Commercial rates, and users of discounted nonprofit rates to pay a lower ratio of the corresponding commercial rates. But that result is a necessary consequence of equalizing nonprofit vs. commercial worksharing discounts—and was also the necessary consequence when the Court of Appeals and the Commission, respectively, approved equalization of discounts in *National Easter Seal Society* and MC96-2. It is also the result that Congress chose to leave undisturbed when enacting 39 U.S.C. § 3626(a)(6) in 2000 and PAEA in 2006.

Worksharing discounts that are equal in absolute terms *by definition* have a greater effect in percentage terms when applied to nonprofit Standard Mail rates than to commercial Standard Mail rates, since the discounts are larger in proportion to the undiscounted rates. Section 3626(a)(6), combined with *National Easter Seals Society*, produces this result because the statute defines the rate relationship between nonprofit and commercial Standard Mail in terms of average revenue for each subclass, rather than, as with nonprofit-vs.-commercial Periodicals Mail, at the level of individual rate elements. If the drafters of Section 3626(a) had wanted to enforce a uniform percentage rate preference at the level of individual rate elements, they would have adopted language akin to the formula for Periodicals mail codified in 39 U.S.C. § 3626(a)(4), which requires the USPS to scale each individual rate element, including

each worksharing discount, down to 95 percent of the corresponding rate element for commercial Periodicals mail.

Indeed, the same kind of deviation from the 60 percent relationship decried by the Postal Service appears in its own rate design. As the Alliance demonstrated in R2013-1, those rates produce higher nonprofit-to-commercial rate ratios within the coarser presort tiers of each automation category, and lower nonprofit-to-commercial rate ratios within the finer presort tiers of the same automation category. *This relationship holds without exception for every automation category of the Postal Service's Standard Mail rate design.*

The Postal Service's throwaway suggestion that "one might argue" that this phenomenon may constitute undue discrimination against undiscounted nonprofit rates and in favor of discounted rates is frivolous. Price differences between rate categories of the same product that are justified by cost differences do not amount to undue discrimination. MC2002-2 Op. & Rec. Decis., *Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One* (May 15, 2003) at 29 ¶ 3030; see also R2006-1 Op. & Rec. Decis. 85 (Feb. 26, 2007) at ¶ 4020 ("price discrimination does not exist . . . when the absolute difference between price and marginal cost for two products is equal."). The Postal Service cites no precedent supporting its idiosyncratic notion of undue discrimination, and it was necessarily rejected by implication in *National Easter Seal Society*—and all of the subsequent Commission decisions that approved equal passthroughs of cost avoidances for nonprofit and commercial mail.

(4) In Docket No. R2013-1, the Postal Service also asserted that discriminatory nonprofit and commercial worksharing discounts are supported by precedent because the Postal Service implemented them in several price adjustment cases several times since the enactment of PAEA, and the Commission did not object. USPS Response to Order No. 1541 at 7-8. The obvious answer is that the discrimination issue was not raised in previous post-PAEA cases. In Docket No. R2013-1, by contrast, the issue was raised quite unambiguously. And ANM specifically raises it again here.

C. The Commission Has Failed To Establish Any Reasonable Basis For the Discrimination.

The Commission, in its December 11 final order in R2013-1 (Order No. 1573), did not accept any of the Postal Service's rationales for the discrimination. Instead, the Commission professed to find reasonable the Postal Service's "justification" that equalizing nonprofit and commercial presort discounts "would be neither more efficient nor preferable from a policy perspective":

The Postal Service correctly points out that the National Easter Seal Society case does not forbid a differential between discounts, but it requires a reasonable justification for the disparity. Here, it justifies the differential with an assertion that equalizing the Nonprofit presort discounts with the Commercial presort discounts without setting the Nonprofit base rates higher would be neither more efficient nor preferable from a policy perspective. The Commission finds that the Postal Service may use its pricing flexibility in setting workshare discounts for commercial and nonprofit Standard Mail, and that in the circumstances of this rate adjustment, its justification is reasonable.

Order No. 1571 at 9.

The Postal Service, however, *made no such assertion*. The Postal Service did not dispute that full equalization of nonprofit and commercial presort discounts might be “the most efficient or otherwise preferable from a policy perspective”; rather, the Postal Service’s objection was that full equalization was *too complex to be practical*. USPS Response to Order No. 1541 (Nov. 26, 2012) at 6-7. As explained above at pp. 18-19, this claim is predicated on a misreading of 39 U.S.C. § 3626(a)(6), which requires application of the statutory 60 percent ratio only at the subclass or class level, not at the level of individual rate cells.⁵

In any event, the notion that “equalizing the Nonprofit presort discounts with the Commercial discounts would be neither more efficient nor preferable from a policy perspective” is flatly at odds from the Commission’s own findings about the economic superiority of full cost passthroughs. The Commission has held repeatedly that full passthrough of cost avoidances generally gives mailers the most accurate signals about whether to buy upstream services such as sorting and transportation from the Postal Service vs. the private sector, and that adherence to this pricing rule, known as the Efficient Component Pricing Rule, enables mailers to obtain end-to-end mail service at the lowest combined cost. Docket No. MC95-1, *Mail Classification Schedule—Classification Reform I*, PRC Op. & Rec. Decis. (Jan. 26, 1996) at ¶¶ 4253-4256; Docket No. R2006-1, *Postal Rate and Fee Changes*, PRC Op. & Rec. Decis. (Feb. 26,

⁵ The Postal Service certainly did not apply the 60 percent ratio to individual rate cells or rate categories when designing the rates implemented in Docket No. R2013-1. Indeed, for any individual rate category, *none* of the ratios between the nonprofit rates proposed by the Postal Service and their commercial counterparts equal 60 percent. See pp. 18-19, *supra* (citing Docket No. R2013-1, ANM Comments on USPS Compliance Filing (Dec. 4, 2012) at 5-8 (Tables 1 and 2)).

2007) at 81-91; Order No. 1320, Docket No. RM2010-13, *Consideration of Technical Methods to be Applied in Workshare Discount Design* (April 20, 2012) at 3. While the Commission has held in recent cases that it the enactment of 39 U.S.C. § 3622(e) has implicitly stripped the Commission of *legal authority* to compel that worksharing discounts comply with the Efficient Component Pricing Rule, the Commission has never repudiated its finding that full passthroughs are superior as a matter of economics. Moreover, nothing in the record of this case, or any other recent case before the Commission, would support a finding to the contrary.

II. THE COMMISSION SHOULD DETERMINE IN THIS DOCKET PURSUANT TO 39 U.S.C. § 3653(c)(1) THAT THE WORKSHARING DISCOUNTS AT ISSUE VIOLATE 39 U.S.C. § 403(c).

The final aspect of Docket No. R2013-1 that warrants comment here is the Commission's remedy. The Commission's discussion of the discrimination issue in R2013-1 ended with a one-sentence admonition about what the Postal Service must demonstrate to justify unequal worksharing discounts in the future:

In future rate adjustment proceedings, the Postal Service must continue to identify in its workpapers when nonprofit workshare discounts differ from their commercial counterparts and to justify deviations from the discounts applied to commercial mail.

Order No. 1573 at 9.

The meaning of this pronouncement is unclear. On the one hand, it can be read as guidance that the Postal Service may win PRC approval of similar discrimination in future cases merely by *continuing* to “identify in [the Postal Service’s] workpapers when nonprofit workshare discounts differ from their commercial counterparts” and *continuing*

“to justify deviations from the discounts applied to commercial mail.” Read in conjunction with the immediately preceding paragraph of the Order, the verb “continue” implies that the “assertion” attributed by the PRC by the USPS in Docket No. R2013-1 passed muster as an adequate justification under Section 403(c), and that equally flimsy rationalizations will “continue” to suffice in future cases.⁶

If this is what the Commission meant, the relief prescribed does not begin to satisfy Section 403(c). The Commission, when finding that the Postal Service is engaging in undue discrimination, must either eliminate the discrimination or provide an adequate explanation for awarding incomplete relief. Empty admonitions that the Postal Service should “continue” to “justify” discrimination in the future do not satisfy the Commission’s responsibility to protect mailers from abuse of the Postal Service’s market power. As the Court of Appeals held three weeks ago in overturning as inadequate the remedy prescribed by the Commission in the *GameFly* discrimination case, “Where the Commission allows discrimination to exist in the postal rate structure, it must explain why that discrimination is due or reasonable under § 403(c).” *GameFly, Inc. v. PRC*, No. 11-1179 (D.C. Cir., Jan. 11, 2013), slip op. at 7. In doing so, the PRC must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.* at 6 (citing *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto Ins.*, 463 U.S. 20, 43 (1983)). “Certainly, if the result reached is illogical on its own terms, the Authority’s order is arbitrary and capricious.” *GameFly*, slip op. at 6 (quoting *Am. Fed’n of Gov’t Employees v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006)).

⁶ As a matter of grammar, the parallelism of the phrases that follow “must continue” means that “must continue” qualifies both “to identify” and “to justify.”

It is also possible, however, that the Commission meant something different. Perhaps the Commission intended simply to defer the discrimination issue to the present docket on the prudential ground that (1) the Postal Service's urgently needed the overall rate increase, and (2) the relatively small fraction of the Postal Service's total revenue and volume affected by the nonprofit worksharing passthroughs at issue made the issue more suitable for disposition in the forthcoming Annual Compliance Review proceeding than in R2013-1 itself. This interpretation of the Commission's action is supported by Order No. 191 in Docket No. 2009-2, in which the Commission indicated that it would resolve discrimination claims in CPI-based price adjustment cases only in "exceptional" cases in which it would be "inappropriate to defer consideration of the issues raised by the commenters until the next annual compliance review or until the completion of a complaint proceeding." Order No. 191 at 69-71 (citing Order No. 43 in Docket No. RM2007-1 at ¶ 2026). If this is what the Commission meant in Order No. 1573, ANM asks the Commission to confirm this understanding.

In either event, ANM respectfully requests that the Commission take the following action in the present ACR docket: (1) confirm that the relationship between commercial and nonprofit worksharing discounts in Standard Mail continues to be governed by the standards established in 39 U.S.C. § 403(c) and *National Easter Seal Society*; (2) find under 39 U.S.C. § 3653(c)(1) that the worksharing discounts offered to nonprofit Standard Mail during Fiscal Year 2012 did not satisfy those standards; and (3) make the same finding about the worksharing discounts established for nonprofit Standard Mail in Docket No. R2013-1.

CONCLUSION

For the foregoing reasons, ANM respectfully requests that the Commission take the actions identified in the previous paragraph of these Comments.

Respectfully submitted,

David M. Levy
Matthew D. Field
VENABLE LLP
575 Seventh Street, N.W.
Washington DC 20004
(202) 344-4732

Counsel for Alliance of Nonprofit Mailers

February 1, 2013
(refiled February 4, 2013)